

# UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:	)	EB DOCKET No. 02-21
PENINSULA COMMUNICATIONS, INC.	)	File No. EB 01-IH-0609
Licensee of stations	)	FRN: 0001-5712-15
KGTL, Homer, Alaska;	)	Facility ID Nos. 52152
KXBA(FM) Nikiski, Alaska	)	86717
KWVV-FM, Homer, Alaska; and	)	52145
KPEN-FM, Soldotna, Alaska	)	52149
Licensee of FM translator stations	)	
K292ED, Kachemak City, Alaska	)	52150
K285DU, Homer, Alaska;	)	52157
K285EG and K272DG, Seward, Alaska	)	52158 and 52160
Former licensee of FM translator stations	)	
K285EF, Kenai, Alaska;	)	
K283AB, Kenai/Soldotna, Alaska;	)	
K257DB, Anchor Point, Alaska;	)	
K265CK, Kachemak City, Alaska;	)	
K272CN, Homer, Alaska; and	)	
K274AB and K285AA, Kodiak, Alaska	)	

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## HERITAGE REPORTING CORPORATION

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Washington, D.C. 20554

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Courtroom TWA-363  
Federal Communications  
Commission  
445 12th Street  
Washington, D.C.

Tuesday,  
March 12, 2002

The parties met, pursuant to the notice of the  
Judge at 9:30 a.m.

BEFORE: HONORABLE RICHARD L. SIPPEL  
Judge

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## APPEARANCES:

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Also on behalf of the Federal Communications Commission:

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On Behalf of Peninsula Communications, Inc.:

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P R O C E E D I N G S

(9:30 a.m.)

JUDGE SIPPEL: Are we set to go on the record?

Okay. Let me see where to start on this. I have some specific ideas about proceeding on this case, but I am going to hold off my comments until I hear from counsel.

Let me get the identification of counsel on the record first. On behalf of Peninsula?

MR. SOUTHMAYD: Your Honor, good morning. I'm Jeffrey D. Southmayd, Southmayd & Miller.

JUDGE SIPPEL: All right. Good morning, Mr. Southmayd. Are you representing all the entities, all the licensees on the caption of the case?

MR. SOUTHMAYD: Correct, Your Honor. Peninsula is the licensee of all the stations that are in the caption there.

JUDGE SIPPEL: Okay. Is Mr. Becker the operator/officer in control of the day-to-day operations of all of these stations?

MR. SOUTHMAYD: Correct, Your Honor.

JUDGE SIPPEL: And on behalf of the Bureau?

MR. SHOOK: James Shook.

MS. LANCASTER: And Judy Lancaster, Your Honor.

JUDGE SIPPEL: Good morning.

MS. LANCASTER: Good morning.

1 MR. SHOOK: Good morning.

2 JUDGE SIPPEL: Okay. Let me start with I want to  
3 first make a note of appreciation. Mr. Southmayd, for  
4 getting copies of these related Orders from the Court of  
5 Appeals for myself and counsel for the Bureau to take a look  
6 at. That is going to be the focus of my first question.

7 Before I ask the question, do you have any  
8 preliminary things that you want to talk about, Mr.  
9 Southmayd, before we go forward?

10 MR. SOUTHMAYD: I'm not sure, Your Honor. I have  
11 a number of preliminary things sort of more on the order of  
12 questions I have, sort of small detail types of things.

13 JUDGE SIPPEL: All right. Let me tell you what my  
14 situation is or what my questions are with respect to what  
15 position are you taking with respect to the impact of these  
16 Orders on this hearing today?

17 MR. SOUTHMAYD: Your Honor, as you can see in the  
18 most recent Court Order, the proceeding involving Peninsula  
19 involves the license renewal applications for the seven  
20 translators that are essentially the subject of the Hearing  
21 Designation Order issued by the Commission.

22 JUDGE SIPPEL: All right. Would you go to the  
23 caption of the case and tell me which of those you are  
24 talking about? Is that the first seven or the second seven?

25 MR. SOUTHMAYD: It is the translators listed under

1 Former Licensee of FM Translator Stations.

2 JUDGE SIPPEL: Starting with Kenai, Alaska, going  
3 down to Kodiak?

4 MR. SOUTHMAYD: Correct.

5 JUDGE SIPPEL: Okay.

6 MR. SOUTHMAYD: And, Your Honor, it also involves  
7 the two translators just above that, K285EG and K272DG,  
8 Seward, Alaska.

9 JUDGE SIPPEL: Okay.

10 MR. SOUTHMAYD: All those translators are subject  
11 to the Order that is on review before the Commission right  
12 now or before the --

13 JUDGE SIPPEL: The Court of Appeals?

14 MR. SOUTHMAYD: -- D.C. Circuit. Yes, sir. The  
15 D.C. Circuit has sent this case to its Merits Panel, and  
16 there are essentially two matters under consideration by the  
17 Merits Panel. The first is our request to remand the entire  
18 matter back to the Commission.

19 In this case, the Commission denied the license  
20 renewals for the seven translator licenses and revoked their  
21 licenses without issuing a Show Cause Order, without giving  
22 us the opportunity to protest it and with the benefit of no  
23 hearing. They just unilaterally denied the renewals and  
24 revoked the licenses.

25 As Your Honor is aware, under Section 309 the

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1 Commission is required before it denies a license renewal  
2 application to issue a Show Cause Order, give us the  
3 opportunity to protest and have a hearing. We have  
4 requested remand just based on the statutory requirement  
5 that was ignored in this case. That is issue number one.

6 Issue number two is our previous appeal, and I  
7 made this Order available to the Court, was dismissed by the  
8 Court of Appeals without prejudice because in the original  
9 Order the Commission denied the license renewals, revoked  
10 the licenses, but took some conditional action.

11 We rejected those actions, and the Court said  
12 that, having done that, the matter was not final and not  
13 subject to their consideration, so they would not consider  
14 it until the Commission acted on our request for rejection  
15 in that first Order.

16 JUDGE SIPPEL: You wanted a clean issue, in other  
17 words? You did not want any of this conditional business?

18 MR. SOUTHMAYD: Correct. We had requested a  
19 transfer. The Commission had said they would allow us the  
20 transfer. We requested a clean transfer. They gave us a  
21 conditional one. We rejected it.

22 The issue went back to the Commission, and the  
23 Commission denied our rejection and said it was not timely  
24 filed. They issued the current Order that is the subject of  
25 our appeal, but in that Order they instituted a show cause

1 proceeding with regard to the two Seward licenses, which we  
2 protested.

3 The Court is asking once again because there is a  
4 pending claim before the Commission with regard to the  
5 Seward translators, which are part of this Order, is the  
6 Commission's Order final for purposes of appeal. Those are  
7 the two issues before the Merits Panel at this point.

8 It's our position that it makes no sense to move  
9 forward with the current hearing until we know whether the  
10 Court intends to remand the entire matter back for hearing  
11 to the Commission and until the Court decides whether or not  
12 the actions by the Commission in the underlying Order is  
13 final.

14 For this reason on the second point, if the Order  
15 is not final and if our license renewals are still,  
16 therefore, pending, there is no doubt that under 1.62 of the  
17 Commission's rules my client is allowed to continue to  
18 operate his stations pending finality on the license renewal  
19 matter.

20 If that's true, the whole basis for this Hearing  
21 Designation Order goes out the window. It's of no sum and  
22 substance, so it makes no sense to move forward with this  
23 proceeding when the Court of Appeals is looking at the exact  
24 same issues and, I believe, there is a very real likelihood  
25 the whole matter, once the Merits Panel gets to the merits



1 of the appeal, will be remanded back to the Commission  
2 anyway for hearing. There is no reason to bifurcate the  
3 matter, to get started and then have to start over.

4 JUDGE SIPPEL: There is now a briefing schedule  
5 before the Court of Appeals? That is what I am reading. I  
6 am talking now the July, 2002, Order. No. Could that be  
7 right?

8 MR. SOUTHMAYD: No, sir.

9 JUDGE SIPPEL: What is the date on the last Order?

10 MR. SOUTHMAYD: June 7. July 7. January 7. I'm  
11 sorry.

12 JUDGE SIPPEL: January 7, 2002?

13 MR. SOUTHMAYD: Yes.

14 JUDGE SIPPEL: Okay. Has the briefing been  
15 completed under that?

16 MR. SOUTHMAYD: Well, the Court asked there are  
17 various intervenors in the Court of Appeals case. The Court  
18 asked the parties other than Peninsula to file briefs on  
19 whether they would be required to file consolidated briefs  
20 or individual briefs and limitations and so forth and gave  
21 the parties a time limitation.

22 No one responded, so the Commission just last week  
23 implemented its requirement that the intervenors, the other  
24 parties, file a consolidated brief in the proceeding. The  
25 actual briefing schedule has not been set yet, although

1 we're expecting it momentarily.

2 JUDGE SIPPEL: When you say the Commission, do you  
3 mean the Court? The Court Ordered some kind of consolidated  
4 briefing?

5 MR. SOUTHMAYD: Yes. The Court did. I'm sorry,  
6 Your Honor.

7 JUDGE SIPPEL: The Court wants a consolidated  
8 briefing, but again there is not a schedule set up on that?

9 MR. SOUTHMAYD: It has not been set. They were  
10 waiting for the parties to file comments on their thoughts  
11 on that. No one responded, so the Court just Ordered the  
12 intervenors to file a consolidated brief. That having been  
13 done, now it's right for the briefing schedule to be set for  
14 the Merits Panel.

15 JUDGE SIPPEL: All right. Is there anything that  
16 the Court of Appeals has issued or is before the Court of  
17 Appeals that specifically addresses this proceeding, the  
18 proceeding we are in today?

19 MR. SOUTHMAYD: Yes, sir. The Court required  
20 Peninsula to file a status report and keep that status  
21 report current. Following hearing designation in this case,  
22 on February 22 I filed a supplemental status report with the  
23 Court informing them of this hearing. It was required under  
24 the Order.

25 In our request for remand, we indicated that we

1 believed in connection with the two Seward Show Cause Orders  
2 that because we had objected the Commission would be  
3 required to hold a hearing based on our protest under  
4 Section 309.

5 Since a hearing was in the offing anyway, we  
6 argued in connection with our Remand Order there is going to  
7 be a hearing on Seward. It would only make sense to remand  
8 the case now or when that happens so that this proceeding  
9 before the Court could be consolidated with that proceeding.

10 I'm hopeful that now that we filed the status  
11 report and notified the Court that there is indeed a hearing  
12 that has been designated involving the purpose of our appeal  
13 that it will expeditiously require a remand so that there  
14 can be a consolidation with the current hearing.

15 JUDGE SIPPEL: Do you mean the issue with respect  
16 to those two Seward stations?

17 MR. SOUTHMAYD: Well, the Court has jurisdiction  
18 over the other seven as well, so with regard to those seven.  
19 Our request for remand is premised on the lack of a Show  
20 Cause Order, the lack of a hearing before the denial of the  
21 license renewal and the revocation of the licenses for those  
22 seven broadcast stations.

23 JUDGE SIPPEL: All right. So now what you have  
24 here is you do have a Show Cause Order, a Show Cause Order  
25 with respect to the viability of the licenses on all these

1 stations, but what is it that you're missing in this  
2 proceeding in terms of what you're asking the Court of  
3 Appeals to give you?

4 MR. SOUTHMAYD: This Hearing Designation Order,  
5 Your Honor, would seem to limit the scope of the hearing to  
6 issues surrounding my client's continued operation of the  
7 translators. It does not address the Commission's action in  
8 denying the license renewals and revoking his licenses to  
9 begin with.

10 JUDGE SIPPEL: Okay. So from my standpoint, the  
11 worst case scenario could be, and I'm speaking very  
12 parochially here on this one. What could happen is the  
13 Court of Appeals could agree with your argument that the  
14 initial determinations of let's call it liability were  
15 entitled to be heard before an Administrative Law Judge, and  
16 they could package the whole thing up and send it over here.

17 I mean, they're not going to care whether we do it  
18 separately or whether we combine them with this hearing. I  
19 mean, that's a problem that we have here maybe, but, in any  
20 event, you're saying that if you get the relief you're  
21 asking at the Court of Appeals, the issues are going to be  
22 expanded with respect to the Hearing Order?

23 MR. SOUTHMAYD: Correct.

24 JUDGE SIPPEL: What is your position on this, Mr.  
25 Shook? Are these the only issues that you feel need to be

1 heard at this point?

2 MR. SHOOK: Well, the Order to Show Cause speaks  
3 for itself --

4 JUDGE SIPPEL: Yes.

5 MR. SHOOK: -- in terms of the issues that the  
6 Commission believes need to be heard. The Order to Show  
7 Cause also goes through an explanation as to how it got to  
8 this point, and in so doing it focuses on the May, 2001,  
9 memorandum, opinion and Order which Mr. Southmayd referred  
10 to a number of times.

11 JUDGE SIPPEL: Yes.

12 MR. SHOOK: That Order is currently on appeal by  
13 Mr. Southmayd's client, and what that Order did, you know,  
14 with all due respect to Mr. Southmayd, is we have a slightly  
15 different impression as to what that Order did.

16 JUDGE SIPPEL: Yes.

17 MR. SHOOK: First of all, that Order did not deny  
18 the license renewal applications for the seven translators  
19 whose continued operation brings us to this point. The  
20 Commission dismissed those applications because a condition  
21 had been attached to the license renewals. That condition  
22 was not fulfilled. That condition was never going to be  
23 fulfilled. That was the Commission's view of what happened.

24 As a consequence, those seven license renewal  
25 applications were dismissed, not denied. As a consequence

1 of their being dismissed, there was no 309 right to a  
2 hearing. The Commission specifically focused on that and  
3 addressed that point.

4 With respect to the two Seward matters, those  
5 license renewal applications were granted. Now, in addition  
6 to being granted, however, the Commission Ordered Peninsula  
7 to show cause why the waivers that had been granted with  
8 respect to those two applications should not be removed.

9 That is a proceeding that Mr. Southmayd has responded  
10 to by paper. Whether or not the Commission decides to hold  
11 a hearing, it would do so pursuant to Section 316, not 309.  
12 That's a matter that is currently being addressed by the  
13 Mass Media Bureau.

14 JUDGE SIPPEL: So as far as you're concerned, this  
15 case is ripe for hearing on these issues?

16 MR. SHOOK: Absolutely. Absolutely. Not only  
17 that; it's something that because the Commission has given  
18 thought to and has discussed the matters that Mr. Southmayd  
19 has referred to, with all due respect Your Honor does not  
20 have the authority under Atlantic Broadcasting to revisit  
21 this matter and decide that the issue should be something  
22 different or something that Mr. Southmayd might wish to  
23 have.

24 JUDGE SIPPEL: I'm not trying to tinker with the  
25 Order at all. I'm simply trying to be sure that it's clear

1 that these are going to be the only viable issues that are  
2 going to be necessary to be heard in this proceeding because  
3 I'm reading from these footnotes in the Hearing Designation  
4 Order referring to the Court of Appeals procedural interest  
5 in these licenses at least at this point, and it's not  
6 clear, you know, what might be expected to be coming down  
7 the pike. That's all. Well, I've said enough on that.

8 MR. SOUTHMAYD: Could I ask a question, Your  
9 Honor?

10 JUDGE SIPPEL: Good ahead. Sure.

11 MR. SOUTHMAYD: Just on this Atlantic Broadcasting  
12 point. Is it the Commission's position, the Hearing  
13 Division's position, that it would be inappropriate for  
14 factual findings to be taken and for issues to be included  
15 in this proceeding involving the underlying denial of the  
16 license renewals and revocation of the license?

17 MR. SHOOK: I'm not quite sure what you're asking.

18 MR. SOUTHMAYD: Well, in citing Atlantic  
19 Broadcasting, are you saying that this Court lacks the  
20 jurisdiction to try the underlying issues pursuant to which  
21 the Commission revoked the licenses for the stations?

22 MR. SHOOK: Again, I mean, do you have something  
23 specific in mind in terms of an issue that you would want to  
24 have tried? I'm not quite sure where you're going with  
25 this.

1 MR. SOUTHMAYD: Well, essentially they're the same  
2 issues up before the Court of Appeals right now. If the  
3 Commission acted beyond its scope of authority and illegally  
4 in its actions, then my client can certainly not be held  
5 culpable for continuing to operate pursuant to his licenses  
6 where the Commission has attempted to stop him from doing so  
7 illegally.

8 We cannot move forward, in my opinion, in this  
9 hearing if my client is precluded from defending himself on  
10 the basis that the Commission acted beyond the scope of its  
11 authority, which is what is pending before the Court of  
12 Appeals right now. That's what I'm saying.

13 That is the underpinning of your whole case that  
14 my client has continued to operate his stations illegally  
15 and contrary to a legal Order for the Commission. It's our  
16 position that it's not a legal Order, but, in any event, he  
17 is authorized to continue to operate because the Order of  
18 the Commission is not final, because his license renewal  
19 applications remain pending, even though the Commission  
20 dismissed them, which, of course, is tantamount to denying  
21 them.

22 Both of those issues are up before the Court of  
23 Appeals now. They've been preliminarily briefed in our  
24 appeal. The initial responses filed by the Commission and  
25 the intervenors is now before a Merits Panel, which is



1 focusing just on those issues, just on the issue of remand  
2 and just on the issue of finality at this point.

3 It makes no sense to push forward here when what  
4 may happen is the Court may say we're remanding it because  
5 the Commission acted illegally and not in accordance with  
6 statute. Why are we moving forward in this hearing if that  
7 is true?

8 MR. SHOOK: Speaking as far as the Bureau is  
9 concerned, we have our marching orders from the Commission  
10 that are spelled out in the Order to Show Cause. The Order  
11 to Show Cause focused, among other things, on I believe the  
12 scenario that Mr. Southmayd is referring to, and that is a  
13 possible reinstatement of the licenses by the Court of  
14 Appeals.

15 The Commission specifically focused on that in the  
16 Order to Show Cause, noting that there are two provisions in  
17 the Communications Act which require licensees to comply  
18 with Commission Orders so long as they are deemed to be  
19 valid. In this case, we have an Order that was issued in  
20 May of 2001 which dismissed license renewal applications,  
21 which canceled the licenses, which meant that Peninsula no  
22 longer had operating authority to operate those seven  
23 translators.

24 Peninsula obviously has a different legal theory,  
25 you know, as to what is appropriate for them, but the

1 Commission spoke both in May and in this Order to Show Cause  
2 specifically addressing the Section 1.62 argument that Mr.  
3 Southmayd has referred to and stating that the licenses have  
4 been canceled. As a consequence, there is no authority to  
5 operate those translators.

6 The question at this point is have those  
7 translators continued to be operated by Peninsula and, if  
8 so, what do they have to say for themselves? That's part of  
9 gathering all the facts and circumstances, and that is the  
10 issue in front of you right now. There is no stay of the  
11 May, 2001, Order. The Court of Appeals has not done that.  
12 The Commission has not done that. That is a current, valid  
13 Order.

14 MR. SOUTHMAYD: Could I address that?

15 JUDGE SIPPEL: Yes, but before you do I want to  
16 ask Mr. Shook this question.

17 I take it what you're saying is we're being told  
18 by the Hearing Designation Order that despite whatever  
19 issues are up before the Court of Appeals, the Commission  
20 has decided that its Order of May whatever it is is a valid,  
21 final Order and that we're only to determine whether, one,  
22 in fact they are continuing to operate the licenses and,  
23 secondly, whether there is some extenuating circumstance  
24 that might somehow or other come into play with respect to  
25 that.

1 Am I correct? I mean, is that really what you're  
2 saying the focus of this case is about?

3 MR. SHOOK: Yes, sir.

4 JUDGE SIPPEL: So what would happen if the Court  
5 of Appeals decides that there are substantive issues which  
6 should be litigated with respect to those licenses?

7 Let me put it this way. Suppose the Court of  
8 Appeals agrees with Mr. Southmayd's argument and remands the  
9 cases back?

10 MR. SHOOK: Your Honor, I would direct your  
11 attention, first of all, to Footnote 2 in the Order to Show  
12 Cause to point out that the Commission did consider the  
13 possibility that the D.C. Circuit could reinstate the  
14 licenses of the seven translators and that in the  
15 Commission's view that still poses a serious problem for  
16 Peninsula in the event they operated between May of 2001 and  
17 the present.

18 MR. SOUTHMAYD: Could I address that?

19 JUDGE SIPPEL: Yes, sir.

20 MR. SOUTHMAYD: It is ridiculous to suggest that  
21 if the Court of Appeals --

22 JUDGE SIPPEL: Let's be careful. Let's be  
23 careful.

24 MR. SOUTHMAYD: Excuse me.

25 JUDGE SIPPEL: You disagree.

1 MR. SOUTHMAYD: I disagree.

2 JUDGE SIPPEL: Go ahead. State your position.

- 3 MR. SOUTHMAYD: Your Honor, if the Court  
4 reinstates the licenses ab initio, Peninsula has operated  
5 legally since its license renewal applications were filed.  
6 This footnote makes absolutely no sense. The Court of  
7 Appeals reinstates their licenses, and then we're to go to  
8 hearing for legal operation during the period that the  
9 Commission claims that we didn't have a license? How is  
10 that possible? I don't understand that at all.

11 MR. SHOOK: Your Honor, it sounds as though Mr.  
12 Southmayd's problem is with the Commission's Order to Show  
13 Cause, which is an entirely different matter than, you know,  
14 whatever problem he may have with us and whatever problem he  
15 may have with you.

16 There is a provision in the Commission's rules for  
17 addressing that. Unfortunately, it doesn't give Mr.  
18 Southmayd, you know, very much to go with right now because  
19 it may well be that under the rules the Commission is not  
20 going to revisit this, but this is what the Commission said.  
21 This is what we have to live with.

22 JUDGE SIPPEL: I'm concerned. My main concern,  
23 really my only concern at this point, is how to  
24 intelligently and efficiently run a hearing here.

- 25 I take it what you're saying is that I have to

1     assume that the Court of Appeals is going to come out in  
2     favor of the Commission on this issue and that there's not  
3     going to be a requirement to go into the substantive charges  
4     that were made in connection with the May proceeding, even  
5     if the Court of Appeals says the cases are remanded for a  
6     full hearing under Section 309.

7             MR. SHOOK: Obviously we can't predict what the  
8     Court of Appeals may do in these circumstances. The only  
9     thing I can say at this point is if the Court of Appeals  
10    issues an Order anywhere remotely near what you just said  
11    and what Mr. Southmayd has been talking about, we'd have to  
12    deal with that when the Order was issued.

13            MR. SOUTHMAYD: Could I address the stay point for  
14    a moment?

15            JUDGE SIPPEL: I'm sorry. Yes. Yes. Go ahead.  
16    I mean, I want to flush this out because I have to try and  
17    stay in this, too. Go ahead.

18            MR. SOUTHMAYD: There is a stay in effect. The  
19    Commission, following our filing of the appeal in the D.C.  
20    Circuit, went to the United States District Court in Alaska  
21    to attempt to get an injunction against Peninsula forcing it  
22    to cease operation. They asked the Court to enforce the  
23    Order.

24            A preliminary injunction was issued that was  
25    stayed by the United States Court of Appeals for the Ninth

1 Circuit in Seattle. That stay is currently in effect. That  
2 stay has been in effect since October 22, 2001, when the  
3 Ninth Circuit issued it.

4 Part of the period, the majority of the period in  
5 question here in the Hearing Designation Order, overlaps  
6 with the period that the stay of the enforcement by the  
7 District Court has been in effect. There has been oral  
8 argument on the permanent stay.

9 Once again, another Court of Appeals has the issue  
10 of Peninsula continued operation firmly in its jurisdiction,  
11 yet here we are with appeals pending in two Federal  
12 Appellate Courts on the same issues that are involved in  
13 this proceeding, Peninsula's continued operation, and the  
14 Commission has determined in spite of that to push ahead  
15 with a hearing on the administrative law front.

16 I don't understand it, but there is a stay in  
17 effect of the District Court Order enforcing the  
18 Commission's Termination Order.

19 JUDGE SIPPEL: Okay. All right. There is a stay  
20 of a District Court Order that in effect enforces this May  
21 adjudication by the Commission?

22 MR. SOUTHMAYD: Correct.

23 JUDGE SIPPEL: The one that you are contesting  
24 over here in the Court of Appeals?

25 MR. SOUTHMAYD: Correct.

1 JUDGE SIPPEL: I take it this Court of Appeals  
2 knows about that?

3 MR. SOUTHMAYD: It does. It's the District  
4 Court's position in Alaska that even though there's an  
5 appeal pending of the overall Order, it has authority to  
6 enforce the termination of operation aspect of the Order.

7 JUDGE SIPPEL: That is in effect what the Bureau  
8 or the Commission is setting up in its Order to Show Cause,  
9 basically the same result.

10 MR. SOUTHMAYD: Exactly.

11 JUDGE SIPPEL: Go ahead. It sounds like there are  
12 some differences of opinion I guess is really the only thing  
13 that I can conclude this morning.

14 All right. We'll go forward. If you want to file  
15 motions, you know, I'm not going to even suggest what the  
16 motions should be, but if you feel any of this should be  
17 addressed with motions by all means get the motions in, but  
18 unless I'm told otherwise I'm going to go forward with this.

19 The evidence, whatever evidence might come in with  
20 respect to this issue, and I'm not asking for any admissions  
21 on the record here, but it sounds to me like everybody knows  
22 that these stations continue to be operating and that  
23 Peninsula is taking the position we can continue to operate  
24 these things until there is a final Order which says that we  
25 can't. Their position is that there is no such final Order.

1           The Bureau, by virtue of the Order to Show Cause,  
2   is taking the opposite position, so the factual  
3   determination, the factual record, should not be that  
4   complicated. Am I missing something?

5           MR. SOUTHMAYD: That's certainly how we would see  
6   it, Your Honor.

7           JUDGE SIPPEL: Well, you don't have to commit to  
8   that, Mr. Southmayd, today.

9           MR. SOUTHMAYD: I think Your Honor is correct in  
10   that regard on the current issues designated in this  
11   proceeding. Of course, I've not seen a Hearing Designation  
12   Order in the Federal Register at this point.

13          JUDGE SIPPEL: Do you mean the Order to Show  
14   Cause --

15          MR. SOUTHMAYD: Correct.

16          JUDGE SIPPEL: -- hasn't made it yet?

17          MR. SOUTHMAYD: No, and I don't know when that may  
18   happen. As I read 1.229, once that happens Peninsula would  
19   have the opportunity to ask for an enlargement of the  
20   issues, and that is something under consideration at this  
21   point.

22          JUDGE SIPPEL: Do you know anything about that,  
23   Mr. Shook?

24          MR. SHOOK: Yes, Your Honor. First of all, I  
25   would respectfully suggest that there is a great deal of



1 difference between an Order to Show Cause and a Hearing  
2 Designation Order. It's the Hearing Designation Order that  
3 has the requirement of being published in the Federal  
4 Register. The Order to Show Cause does not. It is a matter  
5 between us and Peninsula period.

6 JUDGE SIPPEL: I don't have the answer to that  
7 myself, Mr. Southmayd.

8 MR. SOUTHMAYD: Well, it may be titled an Order to  
9 Show Cause, much as the denial of the license applications  
10 may be called dismissals, but it does in fact designate for  
11 hearing all of our licenses or else we wouldn't be here this  
12 morning.

13 MR. SHOOK: No. That is correct, but that  
14 designation takes place with respect to Section 312 and not  
15 309. Section 309 references publication in the Federal  
16 Register. Section 312 does no such thing.

17 JUDGE SIPPEL: Well, we have an APA hearing going  
18 on here, don't we, under the Administrative Procedures Act?

19 MR. SHOOK: Yes, sir.

20 JUDGE SIPPEL: And it's a full hearing on the  
21 record?

22 MR. SHOOK: Yes, sir.

23 JUDGE SIPPEL: Is there no requirement for  
24 publication of Orders, Orders such as this setting a case  
25 down for hearing, in the context of the Administrative

1 Procedures Act?

2 MR. SHOOK: So far as I know at this point in  
3 time, no.

4 JUDGE SIPPEL: No? That's interesting.

5 MR. SOUTHMAYD: I think I have examples of other  
6 similar hearings under Show Cause Orders where there has in  
7 fact been publication in the Federal Register.

8 MR. SHOOK: I don't doubt that publication may  
9 have occurred with respect to other Orders to Show Cause,  
10 but I believe the question you're raising is whether there  
11 is a requirement.

12 JUDGE SIPPEL: Okay. Let's not beat that one to  
13 death here this morning. Again, if you feel that there is  
14 relief that you're entitled to under the Commission's rules  
15 and the applicable law, you're free to file a motion. It  
16 has to be within obviously some period of time, and I can  
17 set that this morning, but I'm certainly not going to --  
18 well, I don't need to go beyond that.

19 You've got your discovery out there, Mr. Shook, I  
20 take it. Would you need any more discovery than that?  
21 Let's assume hypothetically that you got everything that you  
22 asked for in your request to admit. Do you need anything  
23 more?

24 MR. SHOOK: Well, Mr. Southmayd and Bureau counsel  
25 spoke informally before the conference began about a date,

1 and I believe Mr. Southmayd asked for what was it, April 2?

2 MR. SOUTHMAYD: Correct.

3 MR. SHOOK: For supplying responses to our  
4 admissions request.

5 I'm afraid, Your Honor, until we actually see, you  
6 know, what those responses are we're really not in a  
7 position to --

8 JUDGE SIPPEL: No. I'm well aware of that, Mr.  
9 Shook. That's why I said assuming for purposes of  
10 discussion this morning that you get everything or  
11 substantially everything you have asked for would you need  
12 more discovery? Are you going to be going around taking  
13 depositions or chasing witnesses around?

14 MR. SHOOK: In all likelihood, we may not need any  
15 more. That's a determination, though, that we would have  
16 to --

17 JUDGE SIPPEL: I appreciate that, but I mean on  
18 balance if you do get everything you've asked for you're  
19 going to pretty much have your case?

20 MR. SHOOK: We believe so.

21 JUDGE SIPPEL: Okay. Now, I'm not pushing you on  
22 this at all, Mr. Southmayd, but if you're going to look for  
23 discovery you'll have to know about it this morning. Assume  
24 for purposes of what I'm saying here that we're going  
25 forward with this Order to Show Cause on the issues as

1 they're specified here. Do you need any discovery?

2 MR. SOUTHMAYD: Your Honor, I believe that we  
3 would require discovery. Part of the thinking on this was  
4 my belief that due to the hearing there would be publication  
5 in the Federal Register, and 1.229 would kick in.

6 Based on counsel for the Bureau's position, we  
7 would have to rethink what we're going to do, but I would  
8 see the need for discovery. If we're limited to the issues  
9 designated here whether and under what circumstances we've  
10 operated these translators since August of 2001, I think it  
11 would be rather limited discovery.

12 JUDGE SIPPEL: Well, I would assume that, too. In  
13 fact, what I would be asking the parties to consider at  
14 least at this stage was whether or not you could put  
15 together a stipulated record on this thing. I mean, it's  
16 evident that the stations are still being operated by  
17 Peninsula. It's evident that what the issue of law is is up  
18 in the Court of Appeals.

19 It's a question of based on what I'm hearing  
20 today, I can't assume that they intend to violate the law.  
21 They think that they've got a good issue that's up before  
22 the Court of Appeals that the Court of Appeals hasn't  
23 responded to yet.

24 If they're wrong with respect to the Bureau's  
25 position that they can't consider their appellate rights on

1 this, the Commission has terminated these licenses and they  
2 have absolutely no right whatsoever under the law to  
3 continue to operate the station, you disagree on that.  
4 Maybe that's the issue that we should be focusing on here.

5 MR. SOUTHMAYD: Well, we had contemplated  
6 discovery on the issue of the Commission Ordering Peninsula  
7 to terminate operations due to the fact that it's  
8 unprecedented and the Commission's precedent and policy to  
9 require a broadcast station to terminate operation while the  
10 denial of its license application are the subject of duly  
11 filed appeals in the Federal Courts. It's never happened.

12 I've been practicing before this Commission for 24  
13 years, and I've never seen it happen. My research indicates  
14 the Commission has never Ordered a duly licensed broadcaster  
15 to terminate its operation while it's appealing its license  
16 renewals. We were interested in discovery on why the  
17 Commission has suddenly set a new policy on that point,  
18 particularly when we believe statute supports our continued  
19 operation.

20 JUDGE SIPPEL: Well, my point is what is all this  
21 discovery going to show that is going to alter the issue?  
22 Are you intentionally violating a lawful Order of the  
23 Commission that's final, or is the Commission wrong in its  
24 position with respect to the finality? Putting it another  
25 way, what is the outcome of the finality issue?

1           MR. SOUTHMAYD: Your Honor, the issue is phrased  
2 to determine the facts and circumstances surrounding our  
3 continued operation, and we would maintain that those are  
4 certainly facts and circumstances that enter into it, in  
5 addition to those that we have discussed today.

6           I read this Order to be what is our state of mind?  
7 Why do we believe we are authorized to continue to operate?  
8 I think that issue I just raised for discovery is part of  
9 our state of mind.

10          JUDGE SIPPEL: Okay. You know, I'm not going to  
11 say anything more. I mean, you decide what discovery you  
12 need, and let's go forward. Let's set some dates. Who are  
13 you going to discover? I mean, are you going to discover  
14 Bureau staff? Who are you going to discover on this?

15          MR. SOUTHMAYD: First of all, we don't know who is  
16 responsible for putting together the underlying Orders.

17          JUDGE SIPPEL: Well, we're not going to take  
18 discovery on the Order. I mean, the Order is the Order.  
19 You've got an issue of law with respect to the Order, but  
20 unless you're suggesting that there's some kind of evil  
21 intent or something to be out after Peninsula as opposed to  
22 other people, I mean, that's not an issue that you can just  
23 say yes, that's a good idea.

24          MR. SOUTHMAYD: We believe the record in this  
25 proceeding supports it.

1           Your Honor, I think you need to, and perhaps you  
2   do, but this proceeding commenced in 1995. My client has  
3   been subject to the Commission on pursuing this renewal  
4   matter since 1995. There is a very long record. There's a  
5   1995 renewal application. There are 1997 renewal  
6   applications. There is a very long record of ex parte  
7   communications between a large trade association and  
8   decision making members of the Commission staff.

9           We in fact filed a complaint with the Inspector  
10   General's Office on that, and that all goes to the facts and  
11   circumstances surrounding our continued operation. This is  
12   a very messy matter. It's not very cut and dried, and we do  
13   believe that there is, to use your phrase, some sort of evil  
14   intent manifested in this very large record.

15           The Commission has attempted to limit us to a nine  
16   month period in time after seven years of this proceeding  
17   going on. We think that's manifestly unfair, and we think  
18   the record and the facts and circumstances surrounding our  
19   continued operation goes back seven years. It goes back to  
20   everything that is on appeal at the U.S. Court of Appeals,  
21   which includes Orders going back to 1995.

22           Our appeal is not premised just on this one Order  
23   that came out. It appeals all of the preceding Orders  
24   before it, just as I think this proceeding, in order to  
25   accurately reflect the facts and circumstances of on our

1 continuing operation, has to reflect all those facts and  
2 circumstances.

3 I've been told that there's some inference that my  
4 client is thumbing his nose at this Commission. It's not  
5 true. We have a seven year record of what has gone on. He  
6 operated these translators for 20 years before this  
7 proceeding commenced without a single fine, forfeiture or  
8 citation, and we think it's important to develop a full  
9 record on his record of operation and all that has gone into  
10 the seven years that the Commission has been pursuing this  
11 matter for reason we frankly can't explain.

12 JUDGE SIPPEL: Well, whatever you do with respect  
13 to requesting IG investigations or any investigation  
14 whatsoever with respect to what may be in the historical  
15 context of this case is your business. It's your client's  
16 business. I certainly don't intend to open this case up to  
17 that.

18 You know, if there is testimony that comes before  
19 me, if there is evidence, live evidence, that comes before  
20 me that suggests something that I don't see now then of  
21 course I would address it when I see it, but the discovery  
22 processes of this proceeding are not going to be used to go  
23 down that road that would otherwise be the subject matter  
24 for an investigation or by the investigative authority of  
25 this agency. In other words, I'm not conducting an



1 investigation.

2 On the other hand, you certainly are entitled to  
3 have your day in Court. It's a Show Cause Order, and you're  
4 entitled to put your case on.

5 MR. SOUTHMAYD: May I ask, Your Honor?

6 JUDGE SIPPEL: Go ahead.

7 MR. SOUTHMAYD: This goes to discovery. Would it  
8 be useful, since discovery is to be premised on the issues  
9 to be tried, whether there might be a deadline set for  
10 enlarging the issues?

11 JUDGE SIPPEL: That is what I intend to do.

12 MR. SOUTHMAYD: Thank you.

13 JUDGE SIPPEL: That's exactly what I'm here to do  
14 is to set deadlines for the discovery and for an opportunity  
15 to request an added issue. You know what the rules are with  
16 respect to issues that are detected in the course of  
17 discovery. That's a different standard. I'm going to set  
18 deadlines this morning, and we'll just have to take it from  
19 there.

20 I'm assuming that you're here prepared to give me  
21 some idea as to what the scope of your discovery is going to  
22 be. That was in my Prehearing Order. That's what we're  
23 going to discuss today.

24 How much discovery do you need on the issues, on  
25 these issues?

1 MR. SOUTHMAYD: Well, I think it would be handled  
2 through interrogatories.

3 JUDGE SIPPEL: Okay. There is a specific rule  
4 with respect to addressing interrogatories. I take it these  
5 would be interrogatories addressed to the staff?

6 MR. SOUTHMAYD: Yes, sir.

7 JUDGE SIPPEL: There is a specific provision for  
8 that. You know, whatever the rules entitle you to, I'm  
9 going to permit you to seek it.

10 Am I correct that the way the rule is written that  
11 it has to be from only persons who have personal knowledge  
12 of the matters being asked can answer the interrogatories?  
13 Am I correct on that?

14 MR. SHOOK: That's our understanding.

15 JUDGE SIPPEL: I mean, give or take a little bit  
16 on that.

17 I'll follow the rule very specifically. It's a  
18 very narrow rule, but you do have the right to go after it.  
19 Depositions are very unusual. You have to have, you know, a  
20 very specific reason for that, and it may have to go to the  
21 Commission to get authorization to depose anybody on the  
22 staff.

23 I really keep coming back to what I'm here to do  
24 today, and that is to set some dates. Today is the 12th. I  
25 will give you until March 26 to get out your interrogatories

1 and/or requests for admission.

2 Is there anything prohibiting requests for  
3 admission to the staff? Do you know, Mr. Shook?

4 MR. SHOOK: I'd have to focus on the exact wording  
5 of the rule. Right now I can't say one way or the other.

6 JUDGE SIPPEL: Okay. Well, check that out.

7 MR. SHOOK: I do know that interrogatories, you  
8 know, can be submitted to the staff. I don't know.

9 JUDGE SIPPEL: Let's just stay with  
10 interrogatories then today. If you find that there is a  
11 specific provision authorizing Mr. Southmayd, but I think  
12 he's right. I think really the interrogatories are really  
13 it because the nature of the relationship of the Bureau to  
14 the Commission. Anyway, for whatever reason.

15 March 26 you start your discovery with  
16 interrogatories. Are there any third parties that you're  
17 going to be looking to depose or anything of that nature?  
18 Are you going to have any witnesses that are not directly  
19 related to Peninsula that are not, you know, employed or  
20 officers of Peninsula?

21 MR. SOUTHMAYD: Subject to what would come out in  
22 discovery, Your Honor, at this point I don't anticipate  
23 that.

24 JUDGE SIPPEL: Okay. Who would be your witness?  
25 Of course, Mr. Becker would be your witness?

1 MR. SOUTHMAYD: Yes, sir.

2 JUDGE SIPPEL: All right. Let's get the show on  
3 the road.

4 Now, is there any statutory or rule limitation  
5 with respect to filing motions at this point, Mr. Shook, as  
6 far as the Bureau is concerned?

7 MR. SHOOK: None that I'm aware of.

8 JUDGE SIPPEL: Okay. I'm saying regardless of  
9 whatever the limitations.

10 MR. SHOOK: Whatever the substance of the motion  
11 is, that's something that, you know, we would have to  
12 consider and address if and when such a motion showed up.

13 JUDGE SIPPEL: Okay. What I'm going to do is how  
14 much time do you need? I'm not asking you to tell me what  
15 the motions are, but do you have motions in mind, Mr.  
16 Southmayd?

17 MR. SOUTHMAYD: Yes, sir.

18 JUDGE SIPPEL: How much time do you need to get  
19 those filed?

20 MR. SOUTHMAYD: Well, interrogatories/discovery  
21 started by the 26th. Could I have until the 26th of April?

22 JUDGE SIPPEL: To do what, to file a motion?

23 MR. SOUTHMAYD: Yes, sir.

24 JUDGE SIPPEL: Let's see. Am I getting into any  
25 trouble with the 26th with holidays and stuff floating

1 around there? You're okay on that?

2 MR. SOUTHMAYD: Yes, sir. The NAB convention is  
3 earlier than that, but other than that no holidays.

4 JUDGE SIPPEL: All right.

5 MS. LANCASTER: Easter comes right in there.

6 JUDGE SIPPEL: Yes. I was thinking of Easter more  
7 than NAB.

8 MR. SHOOK: I believe that's the 31st of March.

9 MR. SOUTHMAYD: Yes. That's earlier. It is  
10 indeed.

11 JUDGE SIPPEL: Well, the 26th isn't going to  
12 bother you then as far as getting the interrogatories out?

13 MR. SOUTHMAYD: Of March?

14 JUDGE SIPPEL: The 26th of March, yes. I mean, as  
15 far as I'm concerned there's plenty of time. It's just if  
16 there's something intervening. It doesn't look like it.  
17 The only thing in there is Palm Sunday.

18 I'm going to stay with the 26th. On these  
19 interrogatories, if someone gets to turning the wheel on  
20 that they shouldn't be that much of a burden.

21 MR. SOUTHMAYD: Okay.

22 JUDGE SIPPEL: I'm going to give you two more  
23 weeks, to the 9th of April, to get your motion in for  
24 whatever appropriate relief it is. I don't want to limit  
25 you or suggest anything to you.

1 MR. SOUTHMAYD: That's a week after we're --

2 JUDGE SIPPEL: No. Two weeks, isn't it?

3 MR. SOUTHMAYD: Well, it's a week after we're  
4 submitting the answer to the 60 some requests by the Bureau.

5 JUDGE SIPPEL: I see. You're going to be busy.

6 MR. SOUTHMAYD: Yes, sir.

7 JUDGE SIPPEL: All right. Go ahead.

8 MR. SHOOK: Your Honor, if I may? I do believe  
9 that April 9 is more than sufficient. As it is, I would  
10 hope that Peninsula is starting to craft admission responses  
11 as we speak.

12 JUDGE SIPPEL: Well, I'm going to give him another  
13 week. I mean, I know what you're saying. In the best of  
14 all possible worlds, you're absolutely right, Mr. Shook.  
15 I'm not sure if I can do business in that world.

16 We're going to do April 16 now. In other words,  
17 any motion that you're going to file after April 16 you're  
18 going to have to have a very specific cause as to why you  
19 didn't file that particular request for relief by the 16th  
20 of April.

21 Since the scope of this discovery is still even  
22 from the Bureau's side not cast in stone yet, let's start  
23 thinking about a hearing date.

24 MR. SHOOK: Your Honor?

25 JUDGE SIPPEL: Yes? Go ahead.

1 MR. SHOOK: Just so we have clarification, we do  
2 have April 2 then as the date for responses to our requests  
3 for admissions?

4 JUDGE SIPPEL: That's right.

5 MR. SHOOK: Okay.

6 MS. LANCASTER: And if we decide that we want to  
7 do interrogatories, Your Honor, is March 6 our date also for  
8 filing those?

9 JUDGE SIPPEL: Well, I never even thought to  
10 address that. That's why I was asking Mr. Shook if he gets  
11 everything out of the request for admission does he need  
12 anything more. You want interrogatories, too?

13 MR. SHOOK: Well, Your Honor, it is conceivable,  
14 and I don't want to necessarily spill all the beans at this  
15 point.

16 JUDGE SIPPEL: No. I'm not asking you to.

17 MR. SHOOK: It is conceivable that we would desire  
18 a little more information that we would probably seek to  
19 gather in the form of interrogatories and/or document  
20 requests, which I believe we could get out by the 16th of  
21 April. That would give us two weeks after the admissions  
22 responses --

23 JUDGE SIPPEL: I see. Okay.

24 MR. SHOOK: -- to decide what we needed to do, if  
25 anything.

1 JUDGE SIPPEL: All right. Let's do it that way.  
2 Motions for Peninsula and interrogatories and requests for  
3 documents from the Bureau.

4 Now, requests for documents from Peninsula. I  
5 think it's only fair that they have an opportunity to see  
6 the answers to their interrogatories before they have to go  
7 fishing for documents, so I'm going to defer on that until  
8 -- let's see. You get March 26, April 26. April 30 I'm  
9 going to set a date for Peninsula to make its initial  
10 request for documents.

11 MR. SHOOK: Just a word of advice. Peninsula and  
12 the Court should be aware that with respect to document  
13 requests there are some rather significant limitations  
14 imposed relative to seeking such information from the  
15 Bureau, so --

16 MR. SOUTHMAYD: I'm aware of that.

17 MR. SHOOK: -- it may well be that depending on  
18 what it is that Mr. Southmayd wants to see, he might have to  
19 utilize a different means of acquiring such material.

20 JUDGE SIPPEL: Do you mean like FOIA or something  
21 of that nature?

22 MR. SHOOK: Yes, sir.

23 JUDGE SIPPEL: Well, I would expect there would be  
24 an element of cooperation from the Bureau. I mean, what I'm  
25 trying to do is loosen this up to the point where we get



1 ready for a hearing as best I can. I mean, if he's going to  
2 be asking for -- well, let's see what he comes up with.

3 MR. SHOOK: Your Honor, we certainly have every  
4 intention of being cooperative, you know, within the scope,  
5 within the parameters prescribed by the rules.

6 JUDGE SIPPEL: All right. I will put down as  
7 April 30 either the request for documents and/or FOIA  
8 requests or whatever other means there is to get documents  
9 that you feel you need, Mr. Southmayd.

10 MR. SOUTHMAYD: May I ask you a question, Your  
11 Honor?

12 JUDGE SIPPEL: Yes, sir.

13 MR. SOUTHMAYD: If we file requests for documents  
14 hypothetically April 30 and we get a response May 13 that  
15 here are some of the documents, but we won't produce these  
16 because they require a Freedom of Information Act request.  
17 My experience with FOIA requests is they aren't acted on  
18 overnight.

19 What's not clear to me, Your Honor, is at that  
20 point would my FOIA request be something Your Honor would be  
21 acting upon or would the Commission be acting upon?

22 JUDGE SIPPEL: No. You go through the regular  
23 administrative procedures to get FOIA information.

24 MR. SOUTHMAYD: Therefore, my request for  
25 documents, to the extent that would happen, would in all

1     likelihood be significantly delayed, even assuming my FOIA  
2     request was granted?

3             JUDGE SIPPEL: Well, that's possible unless you  
4     can work out something. You have requests for documents  
5     plus FOIA going in at the same time.

6             If you want, April 30 is the deadline. You can  
7     issue a FOIA request tomorrow if you want. You can do FOIA  
8     any time you want.

9             MR. SOUTHMAYD: Right. My question is there are  
10    certain documents I have in mind that I think would be  
11    readily available, but if my response is sorry, this  
12    requests a FOIA request, that's obviously a circumstance  
13    beyond my control that would significantly delay this.

14            Your Honor is suggesting that perhaps I ought to  
15    make a FOIA request for everything I want?

16            JUDGE SIPPEL: Well, I'm not going to suggest it  
17    to you, but I would say you have that remedy. I don't want  
18    to be in a position where a month before the hearing you're  
19    complaining that you don't have the documents that you  
20    wanted to have or that you think you're entitled to have.

21            I mean, ultimately if you don't have certain  
22    documents that you've asked for, you know, we'll come in  
23    here, and we'll make a determination whether or not I  
24    consider them to be really relevant or really necessary.  
25    Some things you're not going to get that maybe you want to

1     against that date. I'm just not going to leave it open.

2             Now, do you all want to get together and talk  
3     about that and let me know at later time, or do you want me  
4     to just set one today?

5             MR. SHOOK: I could throw out a date for  
6     consideration or dates for consideration, and then obviously  
7     if Mr. Southmayd has, you know, a different take he will so  
8     inform you.

9             JUDGE SIPPEL: Let's have your take now, your  
10    thoughts.

11            MR. SHOOK: All right. My thought is that the  
12    hearing that is common to both of us that we have in June is  
13    going to be on the modest side.

14            JUDGE SIPPEL: That's correct.

15            MR. SHOOK: It may take no more than two, perhaps  
16    three days.

17            JUDGE SIPPEL: Yes.

18            MR. SHOOK: It's conceivable that we would wrap it  
19    up even in one day so that beginning the next week, you  
20    know, we could start all the trigger dates so that --

21            JUDGE SIPPEL: Which would be June 25. June 24 or  
22    25.

23            MR. SHOOK: I have a rather extensive vacation  
24    planned to begin around the 20th of July, so I would want to  
25    have everything wrapped up before then.

1 JUDGE SIPPEL: Okay. I can do anything that you  
2 want to do up until the 19th of July, so if you all think  
3 that you can be ready for hearing the week of the 15th of  
4 July, that's okay with me.

5 MR. SOUTHMAYD: I'm quite sure I can't be.

6 JUDGE SIPPEL: You cannot be?

7 MR. SOUTHMAYD: Cannot be. I have previous  
8 commitments from the 21st of July through the 8th and again  
9 the 20th through the 27th.

10 JUDGE SIPPEL: You're talking about August?

11 MR. SOUTHMAYD: July.

12 JUDGE SIPPEL: Sorry. Well, if you go past the  
13 20th, Mr. Shook isn't going to be around. If you go past  
14 the 25th, I'm not going to be around.

15 MR. SOUTHMAYD: I think September makes more sense  
16 for my schedule.

17 JUDGE SIPPEL: Does the Bureau have any objection  
18 to that?

19 MS. LANCASTER: It just seems kind of far away,  
20 but aside from that.

21 MR. SHOOK: Your Honor, one second?

22 JUDGE SIPPEL: Go ahead.

23 (Pause.)

24 MR. SHOOK: Your Honor, we understand that if Mr.  
25 Southmayd has previous commitments there's really not much

1 to be done until September relative to a hearing date, so we  
2 can go with that.

3 JUDGE SIPPEL: All right. How about the week of  
4 the 16th? You're going to have to do some things before the  
5 hearing date. If I set the hearing date down for  
6 September 17, you're going to have to do some things ahead  
7 of time like giving sworn statements of testimony and things  
8 like that.

9 Again, I just don't see that as being all that  
10 burdensome in this case. I'm expecting that I'm primarily  
11 going to hear from Mr. Becker. There may be some evidence  
12 that you uncover from the Bureau. I don't know what you're  
13 going to do with that.

14 There has been a few instances when staff members  
15 have been called to testify. We've had a couple of  
16 situations, Mr. Shook, so there may be something of the  
17 Bureau. There conceivably could be something. For my  
18 purposes it would probably be something more for  
19 clarification, but if there's something that's unsettling or  
20 something that needs that kind of testimony or evidence, but  
21 other than that I don't see how the preparation should be  
22 that burdensome.

23 MR. SOUTHMAYD: Could I address that?

24 JUDGE SIPPEL: You sure can.

25 MR. SOUTHMAYD: I think conceptually I agree with

1 Your Honor. However, based on the initial discovery  
2 implemented, it appears as though evidence is being  
3 requested on the bases upon which these authorizations were  
4 granted to Peninsula, including various waivers of rules  
5 that were approved by staff people as far back as 1981.

6 To the extent that the record or there would be  
7 attempt in the record to submit documents and so forth, we  
8 would need to not only have discovery, but perhaps have  
9 witnesses of those staff people who granted those  
10 applications and the basis upon which those applications  
11 were granted.

12 JUDGE SIPPEL: You'd have to make a very strong  
13 showing to me to get that kind of relief. Normally, you  
14 know, documents are pretty much going to speak for  
15 themselves. As I said, I'm not going to turn this into an  
16 investigation if your client feels that he's been somehow  
17 mistreated here. That's a different issue for a different  
18 place.

19 MR. SOUTHMAYD: Right. No, Your Honor. It would  
20 be more authorizations approved waiving rules, but the  
21 authorizations not specifically saying these rules are  
22 waived.

23 JUDGE SIPPEL: What I'm going to do is I'm going  
24 to set these dates on the theory that the case is going to  
25 be tried basically the way as I see it today. If after you

1 get this discovery from your interrogatories, your FOIA  
2 requests or whatever and you're going to come in asking for  
3 something in addition, then I'll address it at that point.

4 Right now, the issue seems to be it's a clean  
5 issue in a factual sense. It may not be a clean issue in  
6 the legal sense. I've spent a lot of time on that today,  
7 and I don't want to spend any more time on that.

8 All right. I'm going to set September 17, which  
9 is a Tuesday, as the date for this hearing. I'm sorry, but  
10 then somebody is going to have to be working during August  
11 to get this thing ready to go.

12 MR. SHOOK: We'll muddle through.

13 JUDGE SIPPEL: You'll muddle through. Thank you  
14 very much.

15 Why don't you give me some dates? Why don't you  
16 suggest them? What about the exchange of documents,  
17 exchange of your case?

18 MR. SOUTHMAYD: Your Honor, the cases in chief are  
19 going to be in written form?

20 JUDGE SIPPEL: Yes. Unless somebody is going to  
21 give me an objection, yes. Your case, your direct  
22 testimony, will be in written form. That's true of both  
23 parties. It's just a question of, you know, you have to  
24 assemble your documents, the typical exchange of a case.  
25 It's usually a couple weeks before the hearing.

1 I'm hesitating here because I'm looking at my  
2 calendar. I see Labor Day.

3 MR. SOUTHMAYD: Could we move the hearing back a  
4 week to the 24th and then have exchange on the 10th and  
5 avoid that Labor Day weekend?

6 JUDGE SIPPEL: Do you have any objection to that?

7 MR. SHOOK: No, sir.

8 JUDGE SIPPEL: All right. Let's do that.

9 MR. SOUTHMAYD: Thank you.

10 JUDGE SIPPEL: Let's see. Why don't we put the  
11 17th for the designation of witnesses for cross-examination  
12 and September 11 for the exchange of the case, the  
13 documentary case and identification of witnesses. How is  
14 that?

15 MR. SOUTHMAYD: Excuse me, Your Honor. What was  
16 that last date?

17 JUDGE SIPPEL: September 11, which is a Wednesday.  
18 I mean, if you want to do it earlier than that that's fine.  
19 I'm not trying to --

20 MR. SHOOK: And that was the direct case exchange  
21 date?

22 JUDGE SIPPEL: Exactly.

23 MR. SOUTHMAYD: So it's not the 10th, but the 11th  
24 that's the direct exchange?

25 JUDGE SIPPEL: Do you want to do it the 10th?



1 That's okay with me.

2 MR. SOUTHMAYD: No. I was confused. I'm sorry.

3 The 11th is fine.

4 JUDGE SIPPEL: I'm trying to allow for Labor Day.

5 MR. SOUTHMAYD: Okay. Great.

6 JUDGE SIPPEL: All right. Do you need any dates  
7 other than those?

8 MR. SHOOK: Only if Your Honor wished to set a  
9 date for close of discovery.

10 JUDGE SIPPEL: Right now I'm not going to do that.

11 MR. SHOOK: Very good.

12 JUDGE SIPPEL: I don't see any point in doing  
13 that. There's too much going on to set that kind of a date.  
14 You'll be ready to go to hearing certainly. Well, okay.  
15 Let's cut discovery off August 30. Discovery ends. That's  
16 kind of an arbitrary date, but I'm assuming that's the date  
17 before the long weekend for Labor Day. You should have your  
18 discovery done before then hopefully.

19 All right. You know, I certainly want to be kept  
20 apprised of what the Court of Appeals is doing, and the  
21 Court of Appeals, I take it, wants to be apprised of what  
22 we're doing here.

23 MR. SOUTHMAYD: That's true.

24 JUDGE SIPPEL: I'll have an Order issued today or  
25 tomorrow, and you can get that right over to the Court of

1 Appeals if you will. I'm assuming that it's in your  
2 interest to do that. I'm not going to have to worry about  
3 it.

4 MR. SOUTHMAYD: I think I'm required to, Your  
5 Honor.

6 JUDGE SIPPEL: Well, I'm not. Their Order doesn't  
7 apply to me, as far as I can tell.

8 MR. SOUTHMAYD: Yes, sir.

9 JUDGE SIPPEL: But if there is an Order floating  
10 around, please let me know.

11 The last question I have is what about the  
12 intervenors? I don't have to worry about them? I saw that  
13 you gave them notice of your notice of appearance.

14 MR. SOUTHMAYD: It's interesting, Your Honor. As  
15 I mentioned, this last Court deadline the intervenors failed  
16 to file anything, and I have not received any notice of  
17 appearance in this proceeding from the intervenors, so  
18 perhaps they've given up.

19 MR. SHOOK: Your Honor, I don't know if we can  
20 really address that one way or the other because in an Order  
21 to Show Cause proceeding again it's between us and the  
22 entity, and the entity is Peninsula. Frankly, these other  
23 people really don't have any interest.

24 JUDGE SIPPEL: Well, maybe that's exactly how they  
25 see it. You know, I'm just trying to establish some

1 parameters at least in my mind, if not someplace else. All  
2 right.

3 MR. SOUTHMAYD: Could I ask a couple questions?  
4 Not to prolong this, Your Honor, but --

5 JUDGE SIPPEL: Go right ahead. No. That's what  
6 we're here for. Go right ahead.

7 MR. SOUTHMAYD: I note that the Court's Order was  
8 that we both serve each other by fax, and Your Honor, and  
9 serve by first class mail as well. I'm just wondering about  
10 the time computation. Are we going on the three additional  
11 days for service by mail?

12 JUDGE SIPPEL: Yes. As far as your time, that's  
13 exactly right. The way the rules are written with respect  
14 to the presumption that you're going to get three days  
15 service by mail, all those time requirements, are still in  
16 play.

17 The only thing I'm requiring is that because of  
18 the realities of this world these days is be very liberal in  
19 terms of faxing things and e-mailing things not only to me,  
20 but to each other. It's not a question of whether or not  
21 you're preserving your rights. It's a question of being  
22 sure that people get the information in time so that they  
23 can respond to it.

24 MS. LANCASTER: Your Honor, may I ask a question?

25 JUDGE SIPPEL: Sure. Go ahead.

1 MS. LANCASTER: As far as faxing or e-mailing, you  
2 don't get three additional days to send the fax or do the  
3 e-mail, do you?

4 JUDGE SIPPEL: No.

5 MS. LANCASTER: Those are done on the day of  
6 whatever the deadline date is?

7 JUDGE SIPPEL: I want that done -- now, wait a  
8 minute. That's not right.

9 MS. LANCASTER: Okay.

10 JUDGE SIPPEL: If you're going to file something,  
11 if you're going to file something let's say on June 10,  
12 you're filing it, okay? You're filing it. That means that  
13 the certificate of service shows that you mailed it. You  
14 also e-mail or fax a copy of whatever it is that you're  
15 filing to me and to opposing counsel.

16 MS. LANCASTER: On June 10?

17 JUDGE SIPPEL: On the same day. Right. It's a  
18 courtesy copy. The whole idea is there is nobody in this  
19 room that can predict when that mail is going to show up.  
20 For purposes of, you know, what the rules require you to do  
21 in terms of determining whether or not somebody is in  
22 default, you're going to have to show that you put it in the  
23 mail. You're going to have to prove that you put it in the  
24 mail as the rules require.

25 The whole idea of the faxing and the e-mail is

1 simply to be sure. I'm doing the best job I can so that  
2 people keep up to speed in terms of what's going on here so  
3 we can keep that September 26 hearing date. I've found it  
4 to work. I mean, it really does work. There's an element  
5 of cooperation here.

6 As far as the rules are concerned for default and  
7 things of that nature, it's as they're written by the  
8 Commission in 47 CFR.

9 MR. SOUTHMAYD: Your Honor, in terms of hand  
10 delivery, it's all right to fax it to your office, as  
11 opposed to --

12 JUDGE SIPPEL: Absolutely. Now, if you've got  
13 something that's a 40 page document, you know, call my legal  
14 tech or me and let's work that out. Anything that's less  
15 than 20 pages by all means just put in the fax machine.

16 I'm reluctant to ask you to use my e-mail because  
17 I don't sometimes always look to see what e-mail I have, but  
18 the fax machine is a sure thing. Somebody is going to pick  
19 it up out of the fax machine, and I'm going to know it's  
20 there.

21 MR. SOUTHMAYD: Thank you.

22 JUDGE SIPPEL: Okay.

23 MR. SOUTHMAYD: I assume because this is a Show  
24 Cause Order that there's no publication by Peninsula  
25 required under the Commission's rules, at least that I can

1 find. Is that your understanding?

2 JUDGE SIPPEL: I have no idea. I mean, I haven't  
3 looked into that.

4 MR. SHOOK: I believe that is consistent with the  
5 Federal Register aspect in the sense that there is no  
6 statutory provision or rule of which I am aware that would  
7 require Peninsula to publish anything relative to this  
8 hearing.

9 I believe both the statutory provision and the  
10 rule speak to applications that have been designated for  
11 hearing, and this animal doesn't do that.

12 MR. SOUTHMAYD: Finally, as Orders are released by  
13 the Court would the Court like me to provide the Court and  
14 counsel with copies so that you all are updated as that  
15 happens?

16 JUDGE SIPPEL: I would ask you to do that, yes. I  
17 mean, certainly for me, yes. If I'm going to get it,  
18 obviously Mr. Shook and Ms. Lancaster get it. They get  
19 whatever I get.

20 MR. SOUTHMAYD: Yes, sir.

21 JUDGE SIPPEL: I would like to be kept abreast of  
22 it, yes.

23 MR. SOUTHMAYD: Thank you. That's all I have.

24 JUDGE SIPPEL: That's all you have? Okay.

25 MR. SHOOK: I would only want to touch upon one

1 point, and that is we've already had a bit of a track record  
2 relative to service by both fax and by mail.

3 JUDGE SIPPEL: Yes.

4 MR. SHOOK: The Bureau has filed two motions and  
5 has also sent a request for admissions. It's apparent to me  
6 from our conversation that Mr. Southmayd did receive our  
7 request for admissions. I can only presume that he also  
8 received both of our motions.

9 JUDGE SIPPEL: These are the earlier motions that  
10 you filed?

11 MR. SHOOK: Yes, sir.

12 JUDGE SIPPEL: Are these different motions?

13 MR. SHOOK: No, no.

14 JUDGE SIPPEL: The ones I've already acted on?

15 MR. SHOOK: Yes, sir.

16 JUDGE SIPPEL: Do you want to respond to that?

17 MR. SOUTHMAYD: I did. That does raise another  
18 question, though, that I had. It's my understanding under  
19 1.294 that oppositions and replies are due in four days. I  
20 assume, in connection with the Commission's other time  
21 rules, that that excludes intervening holidays and such, or  
22 am I misinformed on that point?

23 JUDGE SIPPEL: The four day rule?

24 MR. SOUTHMAYD: Yes, sir.

25 JUDGE SIPPEL: I think I have a definite answer

1 for that. I think it's four business days.

2 MR. SOUTHMAYD: All right.

3 JUDGE SIPPEL: If there's an intervening holiday  
4 or something, it's not going to be counted against you.

5 MR. SOUTHMAYD: If one were filed, it would be  
6 served by me on mail so I would have four days plus the  
7 three days normally applicable to mail service?

8 JUDGE SIPPEL: That's right.

9 MR. SOUTHMAYD: Even though it's faxed to me?

10 JUDGE SIPPEL: That's correct. You're absolutely  
11 right. Now, if I see it differently, and I've done this  
12 particularly when things get closer to hearing. I'm going  
13 to have a conference call by phone, or if need be we'll do  
14 it here in the courtroom, but there are going to be certain  
15 things that I don't want to be waiting on formalities on.

16 Something certainly like -- well, I don't want to  
17 go into anything right now, but I felt that having heard  
18 nothing from Peninsula on the first motion, the second  
19 motion was asking for essentially the same relief, and it  
20 was really simply a question of when does the government  
21 start telling Peninsula what it is that they want. I  
22 couldn't see any reason to hold back on that.

23 MR. SOUTHMAYD: Yes, sir. No. I wasn't  
24 suggesting that.

25 JUDGE SIPPEL: I know you weren't, but I'm saying



1     that I reserve the right. I guess what I'm trying to say is  
2     that I reserve the right to jump in on this and to get  
3     things moving. I'm not going to feel that I have to be  
4     rigidly bound by waiting for three days for mailing.

5             On the other hand, you're certainly not going to  
6     be prejudiced by it. That's what you're going to get.  
7     You're not going to get any default. Nothing is going to be  
8     entered against you as long as you're meeting the three days  
9     plus whatever the rules give you. I don't want to confuse  
10    the two.

11            MR. SOUTHMAYD: Thank you, Your Honor.

12            JUDGE SIPPEL: The mail situation is absolutely  
13    atrocious. It's the most unreliable situation for purposes  
14    of running a piece of litigation that I've ever experienced,  
15    so keep the faxes flowing.

16            I must ask you this, too. It's easier for the  
17    Bureau, particularly if it's something like a request for  
18    admission, to have somebody from their office just walk down  
19    and drop their courtesy copy off with my legal tech. I  
20    think you would have no objection to that, would you?

21            MR. SOUTHMAYD: Of course not, Your Honor.

22            JUDGE SIPPEL: Okay. I mean, you can get it to me  
23    any way you want, too, but I think the fax is probably going  
24    to be the easiest when you figure out what you have to do to  
25    get through that front gate with a document.

1           Don't ever bring it in in an envelope. If you're  
2 going to hand carry anything in here to give to anybody,  
3 don't bring it in an envelope. That's one of the golden  
4 rules.

5           Okay. Do we have anything else? All right.  
6 Technically then we're in recess until the 26th of  
7 September, but there's a lot of work to do in the meantime.

8           (Whereupon, at 11:05 a.m. the hearing in the  
9 above-entitled matter was concluded.)

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HEARING DATE: March 12, 2002

LOCATION: Washington, D.C.

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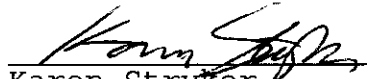
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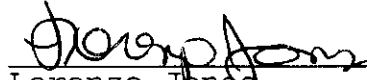
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